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No. 83-1186

IN THE
Supreme Court of the United States,
OCTOBER TERM, 1983

UNIVERSITY OF ARKANSAS BOARD OF TRUSTEES,
BRADLEY JESSON, CHAIRMAN; JACQUELINE
DOUGLAS; ROBERT PUGH; HUGH CHALMERS;
JACK WILLIAMS; HALL MCADAMS, III;
KANEASTER HODGES, JR.; GUS BLASS, II;
M. A. JACKSON, M.D.; W. SYKES HARRIS,
SR.; MEMBERS OF THE BOARD

Petitioners,

vs.

RACHEL GREER AND ROSE MARIE WORD
Respondents.

On Writ of Certiorari to the United
States Court of Appeals for
the Eighth Circuit

**RESPONSE TO PETITION FOR
WRIT OF CERTIORARI**

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OPINION BELOW

The opinion of the United States Court of Appeals for the
Eighth Circuit has recently been reported as *Behler v. Smith*,
719 F.2d 950 (8th Cir. 1983).

STATUTES AND RULES WHICH THE CASE INVOLVES

This case concerns an interpretation of Rule 24 of the Federal Rules of Civil Procedure. More specifically, the court is asked to interpret Rule 24(b)(2) which provides that a district court may grant an application for intervention "when an applicant's claim or defense and the main action have a question of law and fact in common."

This case also concerns an interpretation of Rule 23 of the Federal Rules of Civil Procedure insofar as it applies to cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e. Additionally, it concerns 42 U.S.C. §20003-5(e) and (f)(1) regarding jurisdictional prerequisites to suit.

STATEMENT OF THE CASE

Plaintiff Greer was rejected for the position of Department Chairperson of the Health, Physical Education and Recreation Department (hereafter HPER) at the University of Arkansas at Pine Bluff. She filed a timely charge of sex discrimination with the Equal Employment Opportunity Commission, and filed a second charge alleging retaliation in November, 1979. She subsequently filed a class action complaint on May 13, 1980, alleging across-the-board sex discrimination, including discrimination in the areas of salary and promotion, pursuant to 42 U.S.C. §1983 and 2000e.

In July, 1980, intervenor Word was rejected for the position of Director of Educational Experiences in the Division of Teacher Education at the University of Arkansas at Pine Bluff. Subsequent to filing of the Answers to Greer's complaint, in March, 1981, Word filed her application for intervention. The intervention was granted in August, 1981, and the case was certified a class action in February, 1982. Trial was commenced in the district court for the Eastern District of Arkansas on April 19, 1982, Honorable Henry Woods presiding.

The district court ruled in favor of the plaintiffs in August, 1982. The opinion is reported in *Greer, et al. v. University of Arkansas Board of Trustees*, 544 F.Supp. 1085 (1982). The district court found that the reasons for selection of a male over intervenor Word were clearly pretextual, and that the selection process used to choose Dr. Joseph Cornelius, a black male, over plaintiff Greer, was a "farce". The defendant university appealed on numerous issues, including the issue of whether the district court improperly allowed Word to intervene because she had not filed a charge with the EEOC.

The court of appeals affirmed on all issues except on the issue of whether damages for harassment were allowable and then remanded the case to the district court for further findings.

The defendant university filed a petition for writ of certiorari to the Eighth Circuit Court of Appeals on the issue of whether a person may intervene in a Title VII case which had not been certified as a class action pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, if the person had not timely filed a charge of discrimination with the EEOC and not received and acted upon a right to sue letter.

The petition states that this court has jurisdiction pursuant to 28 U.S.C. §1254 and that the issue is ripe for review because there is a "split among the circuits." It is respondent's position that there is no real split among the circuits on this precise question, as the cases upon which petitioner relies are distinguishable from the instant case.

BASIS FOR FEDERAL COURT JURISDICTION

The district courts have jurisdiction over claims of civil rights violations pursuant to 28 U.S.C. §§1331, 1334, 2201, and 2202. The civil rights violations in this case were claimed pursuant to 42 U.S.C. §§1983 and 2000e.

SUMMARY OF ARGUMENT

The petition for writ of certiorari is based on three premises which have no merit. The decision of the Eighth Circuit upholding the district court's grant of intervention under Rule 24(b) to a plaintiff who had not filed an EEOC charge is supported by the decision rendered by this court in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977) and the majority of cases which have analyzed the permissive intervention issue with regard to Title VII litigation.

The purpose of 42 U.S.C. §2000(e)(5) is to provide notice to the charged party in order to "bring to bear the voluntary compliance and conciliation functions of the EEOC." The Eighth Circuit's holding with regard to intervenor Word is entirely consistent with this purpose, and it reinforces the standards set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973), and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

There is no actual dispute among the circuits on this issue. The Eighth Circuit's position is in accord with the rulings of the Eleventh Circuit and the District of Columbia Circuit. The only holding which is arguably inconsistent with these rulings is *Inda v. United States Airlines, Inc.*, 565 F.2d 554 (9th Cir. 1971), *cert. denied*, 435 U.S. 1007, cited by petitioner, but that case is distinguishable on its facts alone.

The Eighth Circuit has adhered to the rationale articulated by the Fifth Circuit in two significant cases: *Oatis v. Crown-Zellerback Corp.*, 398 F.2d 496 (5th Cir. 1968), and *Wheeler v. American Home Products Corporation*, 563 F.2d 1233 (5th Cir. 1977), and, thus, its decision in the instant matter is consistent with the accepted course of judicial proceedings in Title VII cases.

Therefore, for the foregoing reasons, there are no grounds for a grant of a writ of certiorari in the instant case.

ARGUMENT

Petitioner's petition for a writ of certiorari according to Rule 17.1 of the Rules of the Supreme Court of the United States, is based on three grounds, which are as follows: first, because the Eighth Circuit Court of Appeals has rendered a decision "in conflict with" the Ninth Circuit on the same matter; secondly, because the Eighth Circuit has rendered a decision which is "contrary to its own previous rule for permissive intervention under Rule 24, Federal Rules of Civil Procedure;" and lastly, because the Eighth Circuit's decision has "so far departed from the accepted and usual course of judicial proceedings in Title VII cases" and has so far sanctioned such a departure by the district court, as to require supervision by this Court. See: Rule 17.1 (a), Rules of the Supreme Court of the United States.

Petitioner has framed the issue for review as follows: "Whether a person may intervene pursuant to Rule 24 (b)...in a Title VII case which has not been certified as a class action, if the person has not timely filed a charge of discrimination with the EEOC and has not received and acted upon a right to sue letter."

Petitioner's argument ignores the controlling case law in the Eighth Circuit and in other circuits on the issue of permissive intervention in Title VII cases. The Eighth Circuit in *Allen v. Amalgamated Transit Union Local 788*, 554 F.2d 876 (8th Cir. 1977) held that in a multiple-plaintiff, non-class action suit, every original plaintiff is not required to file charges with the EEOC as a jurisdictional prerequisite. In *Allen*, only two of fifteen plaintiffs had filed EEOC charges. The Court concluded that all fifteen were entitled to assert their claims for backpay and seniority and reasoned that the rationale articulated early in the history of Title VII litigation by the Fifth Circuit in *Oatis v. Crown Zellerback Corp.*, 398 F.2d 496 (5th Cir. 1968), was applicable to the *Allen* plaintiffs. The *Oatis* court held:

"It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical compliants with the EEOC."

Id at 498.

The Fifth Circuit extended this rule to intervenors in *Wheeler v. American Home Products Corporation*, 563 F.2d 1233 (5th Cir. 1977), a case in which class certification was denied. Subsequent to *Wheeler* and *Oatis*, several circuits have adopted their analysis of permissive intervention and interpretation of Rule 24 of the Federal Rules of Civil Procedure. *Burkhalter v. Montgomery Wards & Co., Inc.*, 676 F.2d 291 (9th Cir. 1982); *Crawford v. United States Steel*, 660 F.2d 663 (11th Cir. 1981); *Foster v. Geury*, 655 F.2d 1319 (D.C. Cir. 1981).

The present case was certified a class action in February, 1982, subsequent to Word's application for intervention, which was filed in March, 1981, and granted in August, 1981. Petitioner makes much of the fact that the class had not been certified at the time that the court granted permissive intervention, as though this sequence should restrict Word's rights under Rule 24. Such an interpretation has no basis in Rules 23 or 24, nor in the established legal precedent. If the *Oatis-Wheeler* analysis originally articulated by the Fifth Circuit and followed by the Eighth Circuit and all others having occasion to rule on the matter is good law, it clearly establishes that an individual plaintiff in a Title VII action in which no class has been certified may intervene, pursuant to Rule 24(b), without filing a charge with the EEOC. *Allen, supra*. Thus, the instant case, where class certification has been granted, should be governed by the *Oatis-Wheeler* analysis of Rule 24 permissive intervention.

Petitioner has asked this court to review that portion of the Eighth Circuit's decision which states that the Purpose of 42 U.S.C. §2000(e)(5) with respect to class actions is to "provide notice to the charged party so as to bring to bear the voluntary compliance and conciliation functions of the EEOC." *Behlar*

v. Smith, 719 F.2d 950, 953 (8th Cir. 1983). Not only is the court's interpretation consistent with this purpose, it is entirely consistent with the usual course of judicial proceedings in Title VII cases, and the standards set forth in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) and *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

The seminal case in the area of intervention, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), adopted the same analysis regarding the purpose and legislative intent of Title VII that the Eighth Circuit applied in the instant case. In *United Airlines, supra*, originally *Romasanta v. United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976), the district court had allowed twelve individuals to intervene after the motion for class certification was denied. After judgment had been entered, a putative member of the original class filed a motion to intervene without filing a charge of discrimination with the EEOC.

This Court upheld the Seventh Circuit's decision to grant permissive intervention, reasoning that the company had been *put on notice* by the filing of the Romasanta complaint of the "possibility of classwide liability." (Emphasis added). The court noted that the starting point in deciding the issue of permissive intervention under Rule 24(b) is to determine whether the intervenor(s) are conceptually members of the class represented by the original plaintiff. Under Rule 23(a)(2), one of the prerequisites to a class action is that "there are questions of law or fact common to class." Therefore, the controlling purpose of both rules is the same.

Petitioner argues that the "critical factor" in determining whether an individual must file an EEOC charge to satisfy the jurisdictional requirement prior to intervention is the similarity of the plaintiff's claim and the claim of the intervenor. *Foster, supra*. This position is simply a restatement of the *United Airlines* rule, which the Eighth Circuit has fully adopted.

In the present case, the claims of the respondents Greer and Word are so similar that their chronological separation is immaterial to the issue of intervention. Greer had alleged that she was denied the position of permanent Chairperson of the Health, Physical Education and Recreation Department (HPER) because of her sex, and subjected to unfair treatment during the application process and after a male was selected for the position.

Intervenor Word alleged that she was denied the position of Director of Educational Experiences and was subjected to unfair treatment during the application process because of her sex. Both respondents alleged that they suffered discrimination at the hands of their administrative superiors and that University officials knew of and acquiesced in this discriminatory treatment. The district court granted class-wide injunctive relief on the issues of promotion, pay, assignment and tenure. Under the *United Airlines* rationale, respondent Word was a member of the class which Greer sought to represent.

This court should not grant a writ of certiorari because there is no real dispute among the circuits on the issue of permissive intervention in Title VII cases. The longstanding rule articulated by *Wheeler* has been consistently followed by the Eighth Circuit and is consistent with the holdings in *Crawford v. United States Steel, supra*, and *Foster v. Geuory, supra*, both cases cited by petitioner. Further, the decision by the Ninth Circuit in *Inda v. United States Airlines*, 565 F.2d 554 (9th Cir. 1971), *cert. denied*, 435 U.S. 1007, where the court distinguished between class members and named plaintiffs, is so distinguishable from the instant case on the facts as to render its application to the instant case meaningless.

In *Inda*, neither of the co-plaintiffs had filed timely charges with the EEOC prior to instituting their lawsuit against United Airlines. The defendant had argued that the district court was without jurisdiction over either of the co-plaintiffs. Additional-

ly, the co-plaintiffs had filed a motion to certify the matter as a class action, but that motion was denied. The *Inda* facts are clearly inapplicable to the present case, where Greer's EEOC charge was timely filed and the class was certified by the district court. It is important also to recall that the class certification in the instant case was pursuant to a stipulation of counsel.

Contrary to petitioner's assertions, the situations in *Inda* and *Crawford* are not "almost identical." Rather, *Crawford* concerned a situation where the district court had granted judgment against seven of the plaintiffs because they had failed to file charges with the EEOC. *Crawford* on appeal reversed the district court on the intervention issue and relying on the *Oatis-Wheeler* rationale, held the intervention proper. Although this Court should grant a writ of certiorari when there is a real conflict in the circuits on a specific issue, *Shapiro v. United States*, 235 U.S. 412 (1914), there is no real conflict in the circuits regarding the issue of permissive intervention in Title VII cases.

Finally, the decision of the Eighth Circuit is distinguishable from its holding in *Babcock & Wilcox v. Parsons Corporation*, 430 F.2d 531 (8th Cir. 1970). In *Babcock & Wilcox*, jurisdiction was based on diversity of citizenship and there were no administrative remedies available to the plaintiff, comparable to the EEOC review. The *Babcock & Wilcox* court drew a distinction between intervention as of right and permissive intervention. This distinction is inapplicable to Title VII cases for two reasons. First, the rule requiring independent jurisdictional grounds for permissive intervention in Title VII suits is unnecessary. The express language of Rule 24(b)(2) of the Federal Rules of Civil Procedure, which provides that a district court may grant permissive intervention when there are common questions of law and fact, has been interpreted by the circuits consistently to mean that Title VII plaintiffs must be "similarly situated." Thus, the same determination must be made in either case.

Secondly, requiring independent jurisdictional grounds for permissive intervention in Title VII cases would contravene the whole purpose of Title VII. As long as plaintiffs in Title VII cases satisfy the requirements of Rule 24(b)(2) and assert essentially the same issues against an employer, it would be "nonsensical" to require each of them to file EEOC charges. As the Court stated in *Oatis v. Crown Zellerback Corp.*, *supra*, 398 F.2d at 498, with regard to plaintiffs who alleged race discrimination:

"Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief...would tend to frustrate our system of justice and order."

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari to the Eighth Circuit Court of Appeals should be denied because there is no real conflict among the circuits, and the Eighth Circuit's rule in *Babcock & Wilcox*, *supra*, is distinguishable from the rule for permissive intervention in Title VII cases. Finally, the Eighth Circuit has followed the established legal precedent on this issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen L. Arndt, hereby certify that a copy of the above and foregoing document has been mailed on this 6th day of April, 1984, to: Mr. Steve Clark, Attorney General's Office, State Capitol Grounds, Little Rock, Arkansas 72201; Mr. Ray Trammell, 405 Administration Building, University of Arkansas, Fayetteville, Arkansas 72702; and Ms. Nelwyn Davis, 1700 First Commercial Building, Little Rock, Arkansas 72201.

KAREN L. ARNDT